Supreme Court, U.S.
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No. 98-840

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

WALLACE A. HEUSSER,

Petitioner,

vs.

MLQ INVESTORS, L.P., a Delaware limited partnership,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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LIST OF PARTIES

Parties in the proceedings before the Ninth Circuit and in the District Court who are not parties in this present mattter are:

Stephen Marriott, an individual, as a defendant

Pacific Quadracasting, Inc., a California corporation, as a defendant

Golden Bear Broadcasting, Inc., a California corporation, as a defendant

Golden Bear-1 Broadcasting, Inc., a California corporation, as a defendant.

STATEMENT PURSUANT TO RULE 29.6

Respondent MLQ Investors, L.P., is a Bermuda limited partnership. MLQ, LLC, a Delaware limited liability company, is the sole general partner of Respondent.

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26 U.S.C. § 6323(a) 1, 2, 6, 7, 8

Rule:

Supreme Court Rule 15.2 1

Respondent MLQ Investors, L.P. ("MLQ" or "Respondent"), respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 146 F.3d 746 (1998).

STATUTE INVOLVED

Section 6323(a) of the Internal Revenue Code (26 U.S.C., *et seq.*) provides:

> The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary.

RULE 15.2 STATEMENT

In compliance with Rule 15.2's requirement that Respondent "address any perceived misstatement of fact . . . in the petition that bears on what issues properly would be before the Court," the following is offered:

1. *Foreclosure Procedures*: Petitioner's statement characterizing the receivership action below is misleading. (*See* Petition at 2.) MLQ's filings urged use of, and the district court decided to employ, the procedures endorsed by the FCC to facilitate transfer of a debtor's broadcast licenses after a licensee's default to a creditor. *See D.H. Overmyer Telecasting Co. Inc.*, 94 F.C.C. 2d 117, 123 (1983); *La Rose v. FCC*, 494 F.2d 1145, 1147-48 (D.C. Cir. 1974).

2. *IRS tax liens*: The record below does not support Petitioner's assertion that "the IRS recorded several federal tax liens." (Petition at 3.) The record simply indicates that the IRS

filed a proof of claim with the receiver for $623,703.66 allegedly owed by the radio stations. (AE 98.)[1] The record does not contain any evidence that the IRS filed a notice of lien pursuant to 26 U.S.C. § 6323(a).

3. *Respondent MLQ's Obligation to Ensure Petitioner Paid Federal Taxes*: Petitioner's allegation that MLQ had an obligation to police Petitioner's payment of federal taxes (Petition at 3) is not supported by the record. The loan documents between the parties contain no such obligation. (*See* AE 21-84.) Nor is there any support in the record for Petitioner's speculation that MLQ was "either aware that the station owners were not paying their federal taxes or did not bother asking. . . ." (Petition at 3.) The complaint filed by Respondent does not refer to non-payment of taxes as a breach, only to the monetary defaults and the failure of the radio stations to provide required financial reports. (AE 10.)

4. *Priority of IRS Liens Urged in the District Court*: In reference to Petitioner's assertions regarding the existence of federal tax liens (Petition at 4), the District Court's record fails to establish that Petitioner argued MLQ's liens were subordinate to such liens, although this issue was argued in, and disposed of by, the appeal at the Ninth Circuit. (See PA 14a.)[2] In fact, at the District Court hearing on MLQ's motion to disburse proceeds from sale of the station assets, Petitioner dismissed this argument stating that "whether [the IRS] have a lien or not's largely moot." (AE 167.)

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1. References to the Excerpts of Record in the Court of Appeals will be designated as follows: "AE __" as Appellant's Excerpts of Record.

2. References to Petitioner's Appendix in this case will be designated as follows "PA __".

REASONS FOR DENYING THE WRIT

The Court should decline to accept jurisdiction of this case. It presents no novel or important issues. It was decided by the courts below in accord with settled law. There is no conflict between the law applied by the Ninth Circuit Court of Appeals and that announced by this Court.

I.

THE COURT BELOW CORRECTLY DETERMINED THAT, UNDER STATE LAW, THE RESPONDENT CREDITOR OBTAINED A SECURITY INTEREST IN THE DEBTORS' GENERAL INTANGIBLE RIGHTS TO TRANSFER THEIR BROADCAST LICENSES SUBJECT TO FCC APPROVAL.

A broadcast licensee has the right to sell its interest in the license to a third party, provided that the Federal Communications Commission ("FCC") approves the sale. *See Regents of University System of Georgia v. Carroll* ("*Regents*"), 338 U.S. 586, 597 (1950). This right to sell and realize proceeds from the license comes into existence at the time the license is issued to the licensee, not after licensee sells the license. Such right exists whether or not the right is ever exercised. While the right to transfer certainly must exist whenever a sale occurs, that right to transfer is not dependent on any particular sale or transfer occurring. *See In re Walter Cheskey* ("*Cheskey*"), 9 F.C.C.R. 986, 987 (1994); *In re Ridgely Communications, Inc.* ("*Ridgely*"), 139 B.R. 374 (Bkrtcy. D. Md. 1992); *see also Freightliner Market Development Corp. v. Silver Wheel Freightlines, Inc.* ("*Freightliner*"), 823 F.2d 362, 369 (9th Cir. 1987) (government transport authorities confer a property right on licensee).

The limited right to sell a license with FCC approval in order to generate a profit has been determined to be a general

intangible asset in which a creditor may obtain a security interest. *Cheskey*, 9 F.C.C.R. at 987; *Ridgely*, 139 B.R. at 377; *see also Freightliner*, 823 F.2d at 369. Such security interest is perfectible by filing a financing statement in accordance with the UCC. *Id.*

Subject to a significant restriction, the courts and the FCC consistently allow secured creditors of broadcast licensees to enforce duly perfected liens against the assets of such licensees, including the limited right to sell the license with FCC approval and realize proceeds from that sale. *Id.* The major restriction on this practice is the requirement that lien enforcement procedures employed by a creditor cannot infringe on the regulatory authority of the FCC. *See, e.g., D.H. Overmyer Telecasting Co. Inc.*, 94 F.C.C. 2d 117 (1983) (FCC will not disturb the bankruptcy court's appointment of the secured creditor as receiver to preserve creditor's rights); *La Rose v. FCC*, 494 F.2d 1145 (D.C. Cir. 1974) (FCC abused discretion when it denied renewal of broadcast license to receiver of licensee in bankruptcy proceeding); see also *In re Dillon, Receiver*, 42 F.C.C. 2d 203 (1973) (FCC will not disturb state court proceedings appointing a receiver for broadcast licensee in order to protect creditors).

The law's recognition of an enforceable security interest in the proceeds of sale of a broadcast license rests on the "public/private" distinction described by the Ninth Circuit in the case below. On one hand, the licensee is not entitled to public rights under that license that would extend beyond the privileges and conditions imposed by the licensing authority. *Regents*, 338 U.S. at 597; *FCC v. Sanders Bros. Radio Station* ("*Sanders*"), 309 U.S. 470, 475 (1940).[3] On the other hand, the licensee is

3. Petitioner erroneously asserts that the Ninth Circuit decision in the present case conflicts with *Sanders*, 309 U.S. 470. *Sanders* simply (Cont'd)

not barred from exercising the private rights all others enjoy under state commercial law to engage in a business and to utilize commercial practices — provided these state private rights do not interfere with the regulatory authority of the FCC. *Regents*, 338 U.S. at 597; *Cheskey*, 9 F.C.C.R. at 987.

It is this "private" right of broadcast licensees that is at issue in the present case. It is the licensees' right to avail themselves of the state business and commercial practices available to all others[4] — as long as the regulatory authority of the FCC over the license is undisturbed. In the exercise of that private right, the licensees can pledge such private rights as collateral. *Cheskey*, 9 F.C.C.R. at 987.

As noted above, Petitioner concedes that fact that MLQ had a duly granted security interest in all personal property of the radio stations, including all general intangibles. Further, Petitioner concedes that MLQ duly perfected its security interest in such property by filing UCC financing statements with the appropriate state agencies. As explained in Section II below, the Ninth Circuit properly determined that these facts established MLQ's right to the distribution of the proceeds of sale of the radio stations before payment to any other creditors.

(Cont'd)
reiterated that, as against the FCC (i.e., in exercising the public aspect of the license), a licensee had no rights in a license beyond the privilege to use it for the specified term. *Sanders*, 309 U.S. at 475. The issue of the "private" rights at issue in the case below (*e.g.*, the rights of the licensee as to third parties in the conduct of an enterprise) were not at issue in *Sanders*. However the *Sanders* Court recognized in dicta the private/public dichotomy when it noted that "the [Communications] Act does not essay to regulate the business of the licensee." *Id.*

4. In the present case those rights, as established in the forum state of California, were derived from the UCC.

II.

THE COURT OF APPEALS BELOW CORRECTLY APPLIED THE TEST ENUNCIATED BY THIS COURT REGARDING PRIORITY OF SECURITY INTERESTS UNDER 26 U.S.C. § 6323(a).

The Ninth Circuit's decision does not conflict with the doctrine of this Court regarding the priority of federal tax liens under 26 U.S.C § 6323(a) as set forth in *United States v. McDermott* ("*McDermott*"), 507 U.S. 447 (1995); *United States v. Pioneer American Ins. Co.* ("*Pioneer*"), 374 U.S. 84 (1963); *United States v. New Britain* ("*New Britain*"), 347 U.S. 81 (1954); and *United States v. Security Trust & Savings Bank* ("*Security Trust*"), 340 U.S. 47 (1950). These cases confirm the established principles that: (a) a federal tax lien does not automatically have priority over other liens; and (b) for purposes of federal law, the priority of federal tax liens over other liens is determined by the common law principal of "first in time is first in right." *McDermott*, 507 U.S. at 449; *Pioneer*, 374 U.S. at 88-89; *New Britain*, 347 U.S. at 85; *Security Trust*, 340 U.S. at 49.

These cases also establish that a creditor is determined to be "first in time" (as measured by the date of perfection, not the date any sale proceeds are realized) if certain conditions are met. As explained in *McDermott*, a lien under state law becomes choate (and therefore perfected) for purposes of taking priority over a subsequently noticed federal tax lien when ". . . [1] the identity of the lienor, [2] the property subject to the lien, and [3] the amount of the lien are established." *United States v. McDermott*, 507 U.S. 447, 449 (quoting *United States v. New Britain*, 347 U.S. 81, 85, and citing *United States v. Pioneer American Ins. Co.*, 374 U.S. 84).[5] The Ninth Circuit

5. Although not cited in *McDermott*, the fourth case cited by Petitioner as inconsistent with the Ninth Circuit determination in the (Cont'd)

correctly applied the perfectibility test articulated in *McDermott*. The first element and third elements were not disputed. (*See* AE 110; PA 3a and 11a.) The final element — the identity of the property subject to the lien — was also satisfied. The parties' loans documents specified that the security interest covered all tangible and intangible personal property of the debtors. (AE 21-84.) As set forth in Section I above, the general intangibles include the private right of the licensee to sell the licenses to a third party. The parties do not dispute that MLQ's lien against general intangibles was duly perfected by the filing of appropriate financing statements.[6] As such, the lien is accorded priority over a later filed federal tax lien under 26 U.S.C. § 6323(a). *McDermott*, 507 U.S. at 449.

(Cont'd)
present case, *Security Trust*, is also in accord with the test for lien perfection. *Security Trust* explained that a California attachment lien was contingent until a judgment was entered which could set the amount of the lien. As a result, the amount of the lien was not established and, therefore, not perfected for purposes of priority over a later filed federal lien. *Security Trust*, 340 U.S. at 51.

6. Petitioner suggests that there is a conflict between the Ninth Circuit's disposition of the case below and this Court's treatment of the priority of federal tax liens. Petitioner attempts to equate the after-acquired real property in *McDermott*, the after-incurred debt on real property in *Pioneer*, or the "lis pendens" nature of the California attachment lien on real property prior to entry of judgment in *Security Trust*, with the property at issue in the present case. However, no conflict exists since, as explained above, the property at issue in this case has been determined to be general intangibles acquired by the debtor *before* the creditor's lien was perfected. *See* PA 14a; *Cheskey*, 9 F.C.C.R. at 987; *Ridgely*, 139 B.R. at 377; *see also Freightliner*, 823 F.2d at 369.

III.

NO SOUND PURPOSE WOULD BE SERVED BY CHANGING ESTABLISHED COMMERCIAL LAW AND FCC PRACTICE TO INSTITUTE A REQUIREMENT THAT COMMERCIAL LENDERS POLICE THEIR DEBTORS' PAYMENT OF FEDERAL TAXES.

Petitioner attempts to impart a wide public interest in the outcome of this case by implying that granting certiorari will protect the interests of the federal government in the collection of taxes. However, despite having filed a proof of tax claim with the district court-appointed receiver for the taxes claimed due, the government has never appeared in any proceeding to assert an interest in the proceeds from the transfer of the three radio stations' licenses. (AE 167-168.) Indeed, the record in this case is silent regarding whether the government actually perfected its tax claim as required by 26 U.S.C. § 6323(a). This raises the prospect that if review is taken and the case decided in Petitioner's favor, the government may still be unable to assert the benefits Petitioner would claim for it.

Further, the Petitioner seeks to punish a secured creditor for a federal tax payment default of its debtor. Petitioner asserts that the secured creditor somehow might have protected itself from a superior federal tax lien claim if it had exercised its default remedies sooner. (Petition at 8.) The record in this case lacks support for this speculation.

Petitioner admits the unique circumstances which gave rise to the present case — that the dispute at issue here arose because, as owner and operator of the radio stations, Petitioner had ". . . clearly an unreasonably optimistic expectation" of financial viability. (Petition at 9.) Petitioner further admits that this rendered him ". . . indifferent to any thought of the consequences of failure". (*Id.*)

These unique facts suggests this case is *sui generis*. Unlike the Court's treatment of other creditors, Petitioner urges the Court to hold creditors of broadcast licensees responsible for policing the licensees' tax payments to the government. To impose such a duty on a creditor in a commercial loan transaction would not advance the law of broadcast licensing, secured transactions, or tax collection.

CONCLUSION

The petition for writ of certiorari should be denied. No novel issue is presented by the petition. No conflict exists between the Ninth Circuit's decision in the case below and the cases decided by this Court.

Respectfully submitted,

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